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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1117

EDWARD MISHKIN and
WHOLESALE BOOK CORPORATION,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

On April 30, 1973, in the New York State Supreme Court, New York County, Edward Mishkin and Wholesale Book Corporation pleaded guilty, Mishkin to OBSCENITY IN THE SECOND DEGREE (N.Y. Penal Law §235.05) and Wholesale Book Corporation to OBSCENITY IN THE FIRST DEGREE (N.Y. Penal Law §235.06). On April 2, 1974, that court sentenced Mishkin to a fine of $1,000 or, alternatively, a one-year term of imprisonment and imposed a $10,000 fine upon Wholesale Book Corporation. By an order entered September 30, 1975, the Appellate Division, First Depart-

ment, of the New York State Supreme Court unanimously affirmed these judgments without opinion. Leave to appeal the order of the Appellate Division to the New York State Court of Appeals was denied on November 3, 1975. Mishkin and the corporation now seek a writ of certiorari to review the order of the Appellate Division.[1]

Introduction

By an indictment filed April 19, 1972, the petitioners, Edward Mishkin and Wholesale Book Corporation [hereinafter Wholesale], of which Mishkin was an officer, were charged with 56 counts of obscenity in the first degree. Indictment No. 1925/72. Each count of the indictment alleged that, on specified dates, Mishkin and Wholesale had "possessed with intent to wholesale promote" six or more copies of an obscene motion picture film or book. More than one year later, the petitioners were permitted to plead guilty under the first count of the indictment, Mishkin to the reduced charge of obscenity in the second degree, a misdemeanor, and Wholesale to obscenity in the first degree, a felony. Nearly another year passed before Mishkin and Wholesale were sentenced.

On appeal, Mishkin and Wholesale contended that the search warrant pursuant to which certain obscene material

1. The instant petition was docketed in this Court on February 4, 1976, 127 days after the entry of the order of the Appellate Division affirming the petitioners' convictions and 93 days after the Court of Appeals denied the petitioners' leave to appeal to that court. Therefore, the petition is not "in time." Supreme Court Rules, rule 22(1), 398 U.S. 1033. The petitioners did not request an extension of time within which to file their petition.

had been allegedly seized was defective on its face and, therefore, the trial court should have suppressed the material despite the petitioners' failure to press for a hearing on the question. In addition, Mishkin and Wholesale adopted the allegation of one of their attorneys in the trial court that 103,000 books and motion picture films were seized, claimed that the seizure was without a prior adversary hearing, argued that the right to such a hearing cannot be, and was not, in fact, waived, and contended that the seizure was illegal. Finally, Mishkin and Wholesale asserted that the trial court erred in refusing to permit them to withdraw their pleas of guilty.

The Appellate Division rejected these contentions and unanimously affirmed Mishkin and Wholesale's convictions. Subsequently, the Chief Judge of the Court of Appeals denied the petitioners' application for leave to appeal. Now, upon virtually the same brief submitted to the Appellate Division, Mishkin and Wholesale ask this Court to grant a writ of certiorari to review the Appellate Division's decision.

The Proceedings in the Trial Court

On January 12, 1972, the Honorable Edward K. Pincus, a judge of the New York City Criminal Court, issued a warrant authorizing the immediate search of Wholesale's offices and warehouse at 48-52 East 21st Street and 45 East 20th Street in Manhattan. The warrant authorized the seizure of an alleged obscene motion picture film entitled "Sex Nurse" and corporate books and records evidencing the wholesale promotion of obscene material. The warrant

limited to six the number of copies of the alleged obscene material which could be seized (A61).[2, 3]

The warrant was issued upon the affidavit of Detective Donald Gray (A61-64). In his affidavit, Detective Gray stated that he had probable cause to believe that Wholesale, at its offices on the fifth floor of 48-52 East 21st Street and at its warehouse on the 12th floor of 45 East 20th Street, possessed copies of the film, "Sex Nurse," and books and records evidencing the wholesale promotion of obscene material. Detective Gray based his belief upon the following information and observations: (1) on December 21, 1971, one Ralph Borello sold the film, "Sex Nurse," to an undercover police officer at 136 West 42nd Street in Manhattan; (2) a judge of the Criminal Court viewed the film, found it to be obscene, and, on December 29, 1971, issued a search warrant for the film; (3) on the following day, Borello offered to sell 500 rolls of film, including "Sex Nurse," to an undercover police officer at 136 West 42nd Street; (4) later that day, an unidentified individual, driving an automobile registered to Wholesale at its office address, delivered the 500 rolls of film to Borello and the undercover officer at 136 West 42nd Street and then returned to Wholesale's offices; (5) upon executing a warrant authorizing the search of 136 West 42nd Street, the detective found purchase invoices issued by Wholesale, including an invoice for "Sex Nurse;"

2. Numerical references preceded by "A" are to Appellants' Appendix as filed in the Appellate Division, which, we understand, has been made available to this Court.

3. The six-copy limit is a reflection of N.Y. Penal Law §235.10(2), which provides that one who possesses six or more copies of an obscene article is presumed to possess them with intent to promote them, and of the decision in *Rage Books, Inc.* v. *Leary*, 301 F.Supp. 546 (S.D.N.Y. 1969), requiring the prosecution to return to the defendant all but six copies of each book seized by the police without a prior adversary determination of obscenity.

(6) on January 11, 1972, an undercover police officer saw an unidentified individual take cartons, similar to those used in the delivery of the 500 rolls of film, from Wholesale's warehouse address, load them into the automobile previously seen by the police, and deliver the cartons to several midtown bookstores; (7) according to a real estate agency, Wholesale rented the fifth floor of 48-52 East 21st Street and the 12th floor of 45 East 20th Street (A62-64).

On January 14, 1972, two days after the issuance of the search warrant, Wholesale, Mishkin, and a third party were arraigned in the Criminal Court on a felony complaint charging them with obscenity in the first degree. New York City Criminal Court Docket Nos. A2784, A2785, A2785A. The complaint alleged that Ralph Borello, an agent of Wholesale, had sold 500 rolls of obscene film to a police officer at a bookstore located at 136 West 42nd Street on December 30, 1971, and that a sample of this film had been found obscene by a judge of the Criminal Court. It further alleged that Detective Gray, "in executing a search warrant on January 13, 1972, * * * [had] found approximately 100,000 obscene books + magazines and approximately 3000 movies" at Wholesale's offices and warehouse and that "Judge Edward Pincus [had] on January 13, 1972, viewed samples of the above said books + magazines and held them to be obscene."[4]

4. Based upon papers that were subsequently filed in the trial court, it appears to have been agreed that Judge Pincus was present at the time of the execution of the January 12 search warrant and that the judge inspected various books (if not also films), found them to be obscene, and authorized their seizure by supplementing the original warrant (A68, A98). However, because Mishkin and Wholesale did not seek a preliminary hearing on the felony complaint, did not challenge the validity of the January 12 warrant, and did not contest their guilt, these allegations were never proved.

The case lingered in the Criminal Court for three months, during which time Mishkin and Wholesale could have sought a preliminary hearing on the felony complaint. At such a hearing, the People would have been required to establish reasonable cause to believe that the petitioners had committed a felony. N.Y. CPL §180.70. Mishkin and Wholesale could have demanded the production of the allegedly obscene material referred to in the complaint and required a determination that there was reasonable cause to believe that it was obscene. However, the petitioners chose not to avail themselves of this opportunity.

Then, on April 19, 1972, the felony complaint was superseded by the indictment upon which the petitioners' convictions are based. The indictment contained 56 counts. The first 32 counts concerned allegedly obscene books or films which Mishkin and Wholesale were alleged to have possessed, with intent to "wholesale promote," on January 13, 1972, the date upon which, according to the felony complaint, the January 12 search warrant had been executed (A5-36). The next nine counts of the indictment concerned allegedly obscene films (including the film "Sex Nurse") which Mishkin and Wholesale were alleged to have possessed on December 30, 1971, the date upon which, according to the search warrant's supporting affidavit and the felony complaint, an agent of Wholesale sold 500 rolls of obscene film (including "Sex Nurse") to an undercover police officer. The possession of the films specified in these nine counts was also alleged to have occurred on February 28, 1972. The record does not otherwise suggest the significance of that date (A37-45). February 28 is also the date upon which, in the indictment's remaining 15 counts,

Mishkin and Wholesale were alleged to have possessed additional allegedly obscene books (A46-60).

On July 12, 1972, two of the several attorneys who were to represent Mishkin and Wholesale in the trial court submitted an omnibus motion which requested, *inter alia*, "[a] hearing to determine the admissibility of certain evidence seized and an order suppressing the evidence illegally seized pursuant to CPL [New York Criminal Procedure Law section] 710.10 et seq. in the event it was acquired illegally" and "[a]n order pursuant to CPL 210.20(1)(h) dismissing each count of the indictment on the grounds that the procedure instituting these criminal proceedings did not sufficiently protect the distribution of constitutionally protected material and thus impose[d] an unconstitutional prior restraint on the distribution of literature protected by the First and Fourteenth Amendments to the United States Constitution" (A65-66).

In an affidavit submitted in support of this motion, one of the attorneys, after alleging certain facts, advanced two alternative grounds for the suppression of evidence: (1) "the warrant authorizing the initial search and seizure, the execution thereof, the subsequently issued warrants, and the resulting search and seizure were violative of defendants' First and Fourteenth Amendment rights in that it authorized a seizure of expression presumptively protected by the First Amendment without a prior determination of the obscenity thereof following an adversary proceeding" and (2) "the warrant authorizing the initial search and seizure was procured and issued for the sole unconstitutional purpose and as a subterfuge to authorize a general

exploratory search in violation of the Fourth Amendment" (A79). Counsel concluded this portion of his affidavit, "Consequently, a full hearing should be conducted to judicially investigate facts in support of defendants' claim" (A80).[5]

With respect to the request for the dismissal of the indictment, counsel, apparently relying upon *A Quantity of Books* v. *Kansas,* 378 U.S. 205 (1964), argued that a preseizure adversary hearing to determine the obscenity of the material to be seized was constitutionally mandated and that a prosecution based upon material seized without such a hearing resulted in an unconstitutional application of New York Penal Law section 235.06 (A90-92).

In an affidavit submitted in opposition to the petitioners' motion, the assistant district attorney asked that the petitioners' suppression motion be referred to the judge who would try the case (A96). In a supplemental affidavit, the prosecutor stated that only 32 of the indictment's 56 counts involved material seized pursuant to search warrants and that the petitioners had taken no action since the filing of the indictment for the return of this material on the ground that it was not obscene. The prosecutor revealed that the remaining counts of the indictment involved material purchased from the petitioners by undercover police officers. He argued that such purchases were not seizures, and, therefore, prior judicial inquiry on the question of the obscenity of the material was not required (A99-100).

5. Mishkin and Wholesale did not contend in the trial court, as they did later in the Appellate Division and as they do now, that the search warrant was defective on its face.

On November 24, 1972, New York State Supreme Court Justice Harold Birns rendered a decision on the motion. With respect to the petitioners' request for a hearing on their motion to suppress the physical evidence, the judge referred the matter "to the trial part" (A103). The judge denied the petitioners' motion to dismiss the indictment (A104). The judge noted that he himself had examined the material described in the indictment and found it to be obscene.

More than five months later, Mishkin and Wholesale, then represented by one of the able and experienced attorneys who represented them before the Appellate Division below, chose to plead guilty. A hearing on their motion to suppress had not been held, and the petitioners had still taken no action to secure the return of seized material on the ground that it was not obscene. As a result, of all the factual allegations made in the trial court—those made in the supporting affidavit to the January 12 search warrant, in the felony complaint, in the indictment, in the supporting affidavit to the petitioners' omnibus motion, and in the prosecutor's affidavits in opposition—only those made in the first count of the indictment were ever proved. It was with respect to that count that the petitioners pleaded guilty, Wholesale to obscenity in the first degree as charged there and Mishkin to the reduced charge of obscenity in the second degree (A116-17).

The assistant district attorney stated that these pleas were acceptable to the People and placed on the record the substance of the plea bargain. He informed the court that his office would not recommend a jail sentence for Mishkin

in view of Mishkin's promise to end his long career in pornography. The prosecutor further informed the court that a case was pending in the federal courts and that a decision there might render the petitioners' conduct non-criminal. In such event, the People would join in the petitioners' motions to withdraw their pleas of guilty and move to dismiss the indictment (A117-18).

In response to the court's inquiry, Mishkin acknowledged that he was an officer of Wholesale. The court then advised Mishkin that, prior to the entry of a guilty plea, one was presumed innocent and was entitled to a trial before a jury of 12 people and that conviction could result only if all 12 jurors agreed. The court explained that a conviction upon a plea of guilty, however, was the same as a conviction after trial. Mishkin acknowledged that his attorney had explained to him his "rights and privileges under the jury trial system" (A119). The court then asked whether Mishkin wished to tell the court anything. Mishkin said that he did and asked for an opportunity to speak with his attorney, an opportunity which the court afforded. After speaking with his client, Mishkin's attorney told the court that Mishkin was concerned that his contemplated move to Florida would be prevented by a sentence of probation. The assistant district attorney stated that his office would not object to the transfer of supervisory responsibility from the New York Department of Probation to the Florida authorities. The court indicated that it did not consider probation supervision necessary in view of Mishkin's promise to end his involvement in the pornography business (A119-21). The court asked

Mishkin whether or not he wished to plead guilty, and Mishkin responded, "Yes, sir" (A121).

The assistant district attorney then asked Mishkin questions concerning the facts alleged in the first count of the indictment. Mishkin acknowledged that, on January 13, 1972, a police officer, acting pursuant to a search warrant, had found a quantity of allegedly obscene material at Wholesale's East 21st Street address. He admitted that the book specified in the first count of the indictment, "Adam and Eve #1," was among the material found. He further acknowledged that Wholesale possessed that book with the intent to resell it, that he was aware of the corporation's possession of the book, that he was familiar with "certain laws relative to the publication, to what publications can be made in relation to certain material relating to personal activity of an individual," and that the corporation's possession of the book constituted "a more than a possible violation of those rules of law" (A123-24).

The prosecutor informed the court that "Mr. Mishkin does have quite a bit of prior involvement in this business and it would be our position that he's a large scale wholesaler." He explained that the generous plea bargain was, nevertheless, acceptable to his office in view of the valuable court time saved by the plea, at both the trial and appellate levels, and in view of Mishkin's promise to leave the pornography business (A124). The assistant district attorney concluded by noting that the parties had agreed that the pleas were entered subject to a decision in a case pending before this Court (A124-25).

On October 4, 1973, more than five months later, Wholesale and Mishkin moved to withdraw their pleas of guilty. The petitioners also renewed their previously abandoned motion to suppress evidence alleged to have been illegally seized and again requested a hearing on the motion (A105-06). In an affidavit submitted in support of these motions, Mishkin averred that he had "pleaded guilty because he mistakenly believed he and Wholesale Book Corporation were charged with violating a constitutional statute and because the prosecutor overcharged [them] with 56 counts" (A107). He argued that Judge Birns should have dismissed the indictment because the statute was unconstitutionally vague and the material specified in the indictment was constitutionally protected.[6] He said that the judge's decision denying the petitioners' motion to dismiss had been "substantially impaired by the United States Supreme Court's decisions on June 21, 1973."[7] He continued, "[S]ince pleading guilty, your affiant has learned of a decision of the Honorable [New York State] Supreme Court Judge Gelinoff [*sic*] which held that the New York obscenity statute was unconstitutional under the United States

6. The petitioners had previously advanced this argument in their omnibus motion as basis for the dismissal of the indictment in addition to the argument that the indictment was invalid because of the absence of a pre-seizure adversary determination of obscenity.

7. *Miller* v. *California*, 413 U.S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973); *Kaplan* v. *California*, 413 U.S. 115 (1973); *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123 (1973); *United States* v. *Orito*, 413 U.S. 139 (1973). In these cases, the Court revised the standards which the states must use to identify obscene material in order to regulate disssemination without infringing upon first amendment rights. The Court replaced the requirement, then in effect, that material must be "*utterly* without redeeming social value" before it may be classified "obscene" with the question of "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller* v. *California*, 413 U.S. at 24-25.

Supreme Court decisions of June 21, 1973" (A107-08).[8] Mishkin reasoned that he was thus "in fact not guilty of violating CPL [*sic*] 235.01 et seq.," asserted that he had "pleaded guilty as a result of mistake and misunderstanding, which could not have been reasonably foreseen," and concluded that "the plea was therefore not understandably and intelligently executed" (A108).

With respect to his application to renew his motion to suppress and his request for the return of materials seized, Mishkin again relied upon *Miller* v. *California*, 413 U.S. 155 (1973), and the cases decided with *Miller*. In addition, he cited *Heller* v. *New York*, 413 U.S. 483 (1973) and *Roaden* v. *Kentucky*, 413 U.S. 496 (1973), cases decided on June 25, 1973.[9]

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8. Mishkin may have been referring to *Redlich* v. *Capri Cinema*, 75 Misc.2d 117, 347 N.Y.S.2d 811 (Sup. Ct., Spec. Term, New York County, 1973), in which Judge Gellinoff found N.Y. CPLR 6330, which authorized injunctive relief against the publication of material "obscene" within the meaning of N.Y. Penal Law §235.00, and the §235.00 definition of "obscene" unconstitutionally vague. That decision was subsequently reversed by the state courts. *Redlich* v. *Capri Cinema*, 43 A.D.2d 27, 349 N.Y.S.2d 697 (1st Dept. 1973), *leave denied*, 33 N.Y.2d 974, 353 N.Y.S.2d 738, 309 N.E.2d 136 (1974).

9. In *Heller*, the Court held constitutionally permissible the seizure of a nonobscene motion picture film without a pre-seizure adversary hearing to determine the obscenity of the film under the following circumstances: (1) a judge of the New York City Criminal Court had viewed the film, found it to be obscene, and issued a search warrant for its seizure; (2) the seizure was for the purpose of preserving the film as evidence in a criminal prosecution and not for the purpose of destroying the film; (3) no pretrial motion was made for the return of the film or for its suppression as evidence; and (4) the question of the film's obscenity was fully litigated in a trial commenced 47 days after the seizure of the film and the arrest of its alleged possessor. However, the Court remanded the case to the New York Court of Appeals for reconsideration of the defendant's attack upon the constitutionality of New York's obscenity laws in the light of *Miller* and the cases decided with it.

In *Roaden*, the Court reversed a conviction for exhibiting an obscene film where the film had not been viewed by a judicial officer prior to its seizure and was seized without a warrant. The Court held that the defendant's motion to suppress the film as evidence on the ground of its illegal seizure was improperly denied.

In a decision entered March 15, 1974, the court denied the petitioners' motions. The court noted that the New York Court of Appeals had, in *People* v. *Heller*, 33 N.Y.2d 314, 352 N.Y.S.2d 601, 307 N.E.2d 805 (1973) (on remand), reconsidered the New York obscenity laws in light of this Court's decision in *Miller*, as directed by the Court, and had held them constitutionally valid (A113-14). Since the alleged invalidity of the obscenity laws had been the only ground advanced by the petitioners in support of their motion to withdraw their pleas, the court denied the motion without a hearing. And because it would not permit the withdrawal of the guilty pleas, the court refused to entertain the petitioners' "claim of illegally seized evidence" (A114).

Two weeks later, Wholesale and Mishkin were sentenced. At sentencing, the assistant district attorney reiterated the terms of the plea bargain. He informed the court that, based upon evidence gathered by the police department and by a special investigative grand jury, he believed that "both the corporation and Mr. Mishkin were very, very large wholesalers in New York City's area, if not the country." He recommended that fines be imposed (A130-31).

Still another attorney spoke in behalf of Mishkin and the corporation. He asserted that, because this Court had remanded the *Heller* case on the issue of the constitutionality of the New York obscenity laws rather than deciding the question itself, the terms of the plea bargain required that the petitioners be permitted to withdraw their guilty pleas. Counsel stated, "[W]e never agreed to allow the highest court in New York to decide the constitutionally [*sic*] [of

the] obscenity ordinance" (A132-33). When the court noted that the agreement between the parties had been that the petitioners could withdraw their pleas if the New York obscenity laws were held unconstitutional and that the absence of such a holding left the petitioners without "any federal costitutional question that would affect" the guilty pleas, counsel explained that he "just wanted to state this for the record because [his] client asked [him] to raise all constitutional issues" (A133-34).

Counsel then argued that the petitioners should be permitted to withdraw their guilty pleas because Mishkin had not admitted that he knew that the book, "Adam and Eve #1," was obscene. Counsel asserted that Mishkin still did not know that the book was obscene and, therefore, did not admit that he was guilty (A134-36). The court answered that Mishkin might well believe that "the character and content of the material are something for the benefit of the general public at large" and that the book was not "lewd, lacivious [*sic*], obscene, or anything else," but that belief alone did not make him innocent of the charge, particularly in view of the nature of the material and Mishkin's record (A135-36).

Counsel again thanked the court for "allowing [him] to make the record here" (A136). He then spoke briefly of Mishkin's background and mentioned that the seizure of the obscene material had cost Wholesale considerable sums of money. Mishkin did not wish to be heard. The court imposed the maximum fines allowed (A137-38).

POINT I

This Court has no jurisdiction to review the petitioners' claim that the search warrant issued on January 12 was defective on its face. There has been no showing that the state courts dealt with this claim.

One who petitions this Court to review the judgment of a state court must establish that the Court has jurisdiction to do so. *Durley* v. *Mayo*, 351 U.S. 277, 281-82 (1956); *Stembridge* v. *Georgia*, 343 U.S. 541, 547 (1952); *Memphis Natural Gas* v. *Beeler*, 315 U.S. 549, 651 (1942); *Klinger* v. *Missouri*, 13 Wall. 257, 263 (1871). Petitioners seek to invoke the jurisdiction vested in this Court by 28 U.S.C. §1257(3) (62 Stat. 929).[10] Petition at 2.[11] Under this provision, petitioners are required to demonstrate that the state court judgment which they ask this Court to review rested upon federal grounds. *See, e.g., Durley* v. *Mayo, supra.* Indeed, where "it appears that the judgment [of the state court] *might* have rested upon a non-federal ground," this Court has held that it has no jurisdiction. *Stembridge* v. *Georgia*, 343 U.S. at 547 (emphasis in ori-

10. §1257(3) provides in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

11. We presume that the petitioners' reference to 28 U.S.C. §1253 (62 Stat. 928), which empowers this Court to hear direct appeals from decisions of district courts of three judges, is the result of a typographical or otherwise inadvertent mistake.

ginal). To give effect to this requirement, the rules of this Court provide that one who petitions the Court for certiorari must state "the way in which [the federal questions] were passed upon by the [state] court * * *." Supreme Court Rules, rule 23(1)(c), 398 U.S. 1035.

The petitioners have not, and cannot, satisfy this requirement because there is no indication that the state appellate courts, in fact, dealt with the petitioners' federal claim. In the trial court, Mishkin and Wholesale asserted, *inter alia*, that the seizure by the police of the allegedly obscene material specified in the indictment had violated their rights under the first and fourteenth amendments, in that the seizure had been effected without a prior adversary determination of obscenity (A79). Mishkin and Wholesale also contended that the seizure had violated their rights under the fourth and fourteenth amendments. They alleged that the January 12 warrant had been issued "as a subterfuge to authorize a general exploratory search" (A79). On these grounds, Mishkin and Wholesale demanded the suppression and return of all material seized and requested "a full hearing * * * to judicially investigate facts in support of [their] claim" (A79-80). Subsequently, Mishkin and Wholesale chose not to press their request for a hearing and, prior to a determination of their motion to suppress, pleaded guilty.

On appeal to the Appellate Division, Mishkin and Wholesale raised, for the first time, the objection, advanced here, that the search warrant issued by Judge Pincus on January 12 was defective on its face. Petitioners' brief in the Appellate Division, Point I; Petition, Point I. Since

this objection had not been raised in the trial court, the Appellate Division was, under New York Law, without jurisdiction to entertain it as a matter of law. N.Y. CPL §§470.05(2), 470.15(4). The Appellate Division does have jurisdiction to reverse or modify judgments "[a]s a matter of discretion in the interest of justice." N.Y. CPL §470.15(3)(c). However, since the Appellate Division affirmed the petitioners' convictions without opinion, it is clear that the Appellate Division did not exercise whatever discretion it might have had in this case.

The Appellate Division had good reason not to exercise its discretion. For, although the petitioners characterized their attack as being upon the face of the warrant, the resolution of their claim depended (and depends) upon factual matters about which the record in the Appellate Division was silent.

At the heart of petitioners' attack in the Appellate Division was their assertion, which is repeated here, that 103,000 books and movies were seized pursuant to the warrant, as it was originally drawn. Petitioners' brief in the Appellate Division at 6; Petition at 8. From this assertion, Mishkin and Wholesale proceeded to the suggestion, also repeated here, that the warrant authorized the seizure of "obscene" material with no further particularization of such material. Petitioners' brief in the Appellate Division at 6; Petition at 8. Upon this assertion and this suggestion, Mishkin and Wholesale concluded, as they do here, that the warrant was defective on its face, that a hearing was not necessary to make that finding, and that the trial court should have recognized as much and summarily or-

dered the suppression of the material seized on this ground even though it was not requested to do so.

Yet, it seems clear that, contrary to the petitioners' suggestion, 103,000 items were not seized under the authority of the January 12 warrant as originally written. Nor did that warrant authorize the seizure of "obscene" material without further particularization. That warrant authorized only the seizure of the film, "Sex Nurse," which had allegedly been viewed by a Criminal Court judge two weeks earlier and found to be obscene.[12]

At the time this narrowly drawn warrant was executed, it seems (or at least there appears to have been no dispute below) that large quantities of allegedly obscene material were found by the police. However, there also appears to have been no dispute that Judge Pincus was present at the time of the execution of the January 12 warrant and that he inspected various books (if not also films), found them to be obscene and authorized their seizure by supplementing the original warrant. Thus, the petitioners' assertion that 103,000 items were seized pursuant to the warrant, as originally drawn, is not supported by any evidence and is probably incorrect.

Beyond the very narrow area of agreement which can be discerned in the pleadings, motion papers, and other

12. Mishkin and Wholesale suggested in the Appellate Division, as they do here, that Judge Pincus, who issued the warrant, was not justified in relying upon a finding of obscenity by another judge, absent a "showing of the basis for the conclusion" of that judge. Petitioners' brief in the Appellate Division at 6-9; Petition at 8-10. But Judge Pincus was not obliged to find that the described film was obscene as a matter of law. He only had to find probable cause to believe that it was obscene. For this finding, Judge Pincus was certainly justified in relying upon the recent finding of a fellow Criminal Court judge, whom Judge Pincus doubtless knew personally.

such material which make up the record of the proceedings in the trial court, lies a morass of unproven allegations and, beyond that, a void. As a consequence, from the record we do not know, as a matter of proven fact, what items of allegedly obscene material Judge Pincus examined at the time of the execution of the January 12 warrant, the manner in which that examination was conducted, how the warrant was supplemented, what seizures were authorized, what exactly was seized, or when seizures were made. Since the state of the record before the Appellate Division was wholly attributable to the petitioners' decision not to attack the "face" of the warrant in the trial court, not to litigate fully the legality of the seizure, and not to contest their guilt, there was good reason for the Appellate Division not to review the petitioners' untimely objection.

The clear statutory limitation upon the Appellate Division's power to review questions not raised in the trial court and the strong reasons which existed for declining to exercise its limited discretionary power to review such questions in the interest of justice provided the Appellate Division with independent and adequate state grounds upon which to base its decision. *See Henry* v. *Mississippi*, 379 U.S. 443 (1965); *see also Parker* v. *North Carolina*, 397 U.S. 790, 798-99 (1970). Certainly, a state appellate court's refusal to entertain a claim raised for the first time on appeal serves a legitimate state interest. *See Henry* v. *Mississippi*, 379 U.S. at 447. That interest is the avoidance of unnecessary expenditures of judicial and prosecutorial resources in the litigation of cases which, had the defendant made a timely objection, might have been dismissed early in the criminal proceedings. *See, e.g., People* v. *Vidal*,

26 N.Y.2d 249, 254, 309 N.Y.S.2d 336, 257 N.E.2d 886 (1970). Moreover, there is a clear interest, no less in the state appellate courts as in this Court, for appellate review to be based upon a full and complete factual record. *See Wainwright* v. *City of New Orleans*, 392 U.S. 598 (1968) (concurring opinions); *Johnson* v. *Massachusetts*, 390 U.S. 511 (1968); *Massachusetts* v. *Painten*, 389 U.S. 560, 561 (1968); *Smith* v. *Mississippi*, 373 U.S. 238 (1963).

POINT II

The Court has no jurisdiction to review the petitioners' claim that they were entitled to an adversary determination of obscenity before the seizure of their books and films.

As we have said before, Mishkin and Wholesale contended, in the trial court, that the seizure by the police of the allegedly obscene material specified in the indictment, without a prior adversary determination of obscenity, violated their rights under the First and Fourteenth Amendments.[13] They sought two forms of relief: (1) they demanded the suppression and return of all material seized and requested "a full hearing * * * to judicially investigate facts in support of [their] claim" (A79-80); and (2) they asked that the indictment be dismissed, arguing that a prosecution under New York Penal Law section 235.06, commenced without a prior adversary determination

13. Mishkin and Wholesale also contended, as we have said before, that the seizure violated their rights under the fourth and fourteenth amendments. They alleged that the January 12 warrant was issued "as a subterfuge to authorize a general exploratory search" (A79). The petitioners did not litigate this question below and do not raise it here.

of obscenity, constituted an unconstitutional application of that section (A90-92).

Judge Birns, to whom the petitioners' motion was addressed, denied the petitioners' request for the dismissal of the indictment, citing *People* v. *Heller*, 29 N.Y.2d 319, 327 N.Y.S.2d 628, 277 N.E.2d 651 (1971), *remanded on other grounds*, 413 U.S. 482 (1973), *aff'd*, 33 N.Y.2d 314, 352 N.Y.S.2d 601, 307 N.E.2d 805 (1973) (*see* note 9 *supra*). However, by referring their motion to suppress to the trial part, Judge Birns afforded Mishkin and Wholesale an opportunity to pursue their constitutional claim (A103-04). The judge's obvious purpose was to permit a hearing on the motion to suppress to be held by the trial judge. *See* N.Y. CPL §710.60. But the petitioners did not press their demand for a hearing, did not seek a final determination of their motion to suppress, and, five months after Judge Birns' decision, pleaded guilty.

New York, unlike most states, permits a defendant who pleads guilty to preserve for appellate review his objection to illegally seized evidence. But, in order to preserve his claim for appeal, the defendant must fully litigate his suppression motion in the trial court and obtain an "order finally denying" his motion. N.Y. CPL §710.70(2); *see Lefkowitz* v. *Newsome*, 420 U.S. 283, 289 (1975). By pleading guilty before obtaining such an order, under New York law Mishkin and Wholesale forfeited their right to appellate review of their objection. N.Y. CPL §710.70(3); *see People* v. *Esajerre*, 35 N.Y.2d 463, 466, 363 N.Y.S.2d 931, 323 N.E.2d 175 (1974).

Therefore, the Appellate Division had an independent and adequate (indeed, conclusive) state ground upon which to reject the petitioners' claim that they were entitled to a pre-seizure adversary determination of obscenity. Certainly, a state has a legitimate interest in discouraging departures from a procedure which permits prompt appellate review of certain constitutional objections without the necessity of trials at which the defendant cannot prevail. *See generally Henry* v. *Mississippi*, 379 U.S. 443 (1965); Point I *supra; see also Lefkowitz* v. *Newsome*, 420 U.S. at 289-90. Consequently, Mishkin and Wholesale cannot demonstrate that the state appellate courts relied upon federal grounds when they refused to review the petitioners' claim that certain evidence had to be suppressed because it had been seized without a prior adversary determination of obscenity.

Petitioners also moved to dismiss the indictment on the ground that there had been no pre-seizure adversary determination of obscenity. On that motion, there was a final determination in the trial court. However, the denial of a motion to dismiss the indictment on the ground of illegally seized evidence does not raise a federal constitutional question. Even if, in the circumstances of this case, a pre-seizure adversary hearing were constitutionally required,[14]

14. It is clear that such a hearing was not constitutionally required here. This case falls squarely within the scope of the decision in *Heller* v. *New York*, 413 U.S. 483 (1973). In *Heller*, as here, there was a pre-seizure judicial determination of obscenity. There, as here, the ensuing seizure was for the purpose of preserving the allegedly obscene material as evidence and not for the purpose of destroying it. There, as here, the defendant chose not to avail himself of opportunities to challenge the seizure before trial. Moreover, in *Heller*, the question of the obscenity of the seized material was fully litigated in a

(footnote continued on next page)

the Constitution would mandate only the suppression of the evidence at trial. (And, as we have shown, the petitioners withdrew their request for this relief.) The Constitution would not mandate the dismissal of the indictment. *See United States* v. *Calandra*, 414 U.S. 338, 344-45 (1974); *United States* v. *Blue*, 384 U.S. 251, 255 (1966); *Lawn* v. *United States*, 355 U.S. 339, 349-50 (1958); *Costello* v. *United States*, 350 U.S. 359, 361-63 (1956); *Holt* v. *United States*, 218 U.S. 245, 247-48 (1910). Of course, in New York a court might dismiss an indictment if it finds that the only evidence before the grand jury had been illegally seized. N.Y. CPL §§210.20(1)(b), 70.10(1). However, whether or not a New York court does so raises questions of state, not federal, law.

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trial commenced 47 days after the sizure. Here, Judge Birns, in response to the petitioners' contention, made in support of another aspect of their omnibus motion, that the books and films specified in the indictment were constitutionally protected (A87-88), examined the material and found it to be obscene (A104). This finding constituted an adversary determination of obscenity. Mishkin and Wholesale decided not to seek another such determination, by pressing for a hearing on their motion to suppress, and pleaded guilty.

In approving the seizure in *Heller*, the Court stated, "This Court has never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized. * * * In particular, there is no such absolute right where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution." 413 U.S. at 488 (citations omitted). The Court specifically distinguished *A Quantity of Book* v. *Kansas*, 378 U.S. 205 (1964), relied upon by the petitioners. The Court described that case as involving the "seizure of large quantities of books for the sole purpose of their destruction." 413 U.S. at 491.

POINT III

The so-called "waiver" which the petitioners challenge here had no bearing upon this case.

At the time of the petitioners' arraignment on the felony complaint drawn shortly after their arest, the presiding judge, the Honorable Hyman Solniker, entered the following endorsement upon the official Criminal Court papers attached to the complaint:

> Counsel waives adversary proceeding and agrees to turn over seizure to Police Dept. Counsel does not waive any motions or hearing addressed to said seizure and the obscenity thereof. /s/ H.S.

The record contains only unproven and frequently conflicting allegations concerning the meaning of this endorsement and the discussions which led to its entry upon the court papers. In an affidavit submitted in support of the petitioners' omnibus motion, one of the petitioners' attorneys alleged that an assistant district attorney had, at the time of the execution of the January 12 warrant, "threatened the defendant's attorney [not the affiant] with a request for $25,000 bail unless the attorney, in behalf of his client, waived defendant's First, Fourth and Fourteenth Amendment rights and consented to the seizure, without prior adversary hearing, or even prior judicial scrutiny, of all the adult literature in the [Wholesale's] warehouse" (A68). However, according to the assistant district attorney, it had been Mishkin's attorney who had "suggested that he would waive an adversary hearing if * * * [the prosecutor] would consider making a lower bail application" (A99). This conflict was never resolved.

In any event, regardless of the meaning of this "waiver" or the manner in which it had come about, it had no bearing upon the case. In their omnibus motion, Mishkin and Wholesale demanded the suppression and return of material seized pursuant to the January 12 warrant on the ground that there had been no pre-seizure adversary determination of obscenity and requested a hearing on their application. The prosecution responded by asking that the matter be referred to the trial part, and the judge to whom the motion was addressesd so ordered. Thus, neither the parties nor the judge considered the petitioners' previous "waiver" to bar their objection to the absence of a pre-seizure adversary determination of obscenity. Subsequently, Mishkin and Wholesale abandoned their motion to suppress and pleaded guilty. By so doing, they rendered irrelevant both the meaning of the "waiver" and the question whether it had been made voluntarily. For this reason, this Court should decline to hear the petitioners' contentions.

POINT IV

The petitioners' contention that they should have been permitted to withdraw their guilty plea does not raise a federal question.

Mishkin and Wholesale do not contest the voluntariness of their guilty pleas or the propriety of the trial court's acceptance of them. They argue, instead, that they should have been permitted to withdraw their pleas because (1) they claimed they were innocent (Petition at 21) and (2) "there was a mutual mistake of fact and law in the giving and acceptance" of their pleas (Petition at 22).

At sentencing, nearly one year after the petitioners pleaded guilty, one of Mishkin's attorneys, for the first time, advanced the argument that the pleas had been "taken in a constitutionally insufficient manner, [in] that the defendant never, when he did enter the plea of guilty, admit knowledge of the character or content of the material" (A 134). Counsel added, "[E]ven today he [Mishkin] doesn't admit he is guilty" (A135). But, at the time of the entry of the guilty pleas, Mishkin, who had had considerable experience with the obscenity laws [*see, e.g., Mishkin* v. *New York*, 383 U.S. 502 (1966)], had admitted that he "knew about" the material stored in Wholesale's warehouse and that it was probably obscene within the meaning of those laws (A123-24). Thus, this so-called "claim of innocence," as the trial court recognized (A135-36), amounted simply to an argument that one can escape criminal liability under the obscenity laws merely by asserting one's sincere belief that the materials, alleged to be obscene in the legal sense, actually benefitted the general public and were not obscene in the broader, philosophical sense.

In any event, the acceptance of a guilty plea, even by one who claims innocence, does not violate the United States Constitution. *See North Carolina* v. *Alford*, 400 U.S. 25 (1970). An entirely seperate question, and the one which the petitioners seem to be raising, is whether the trial court abused its discretion under New York law when it refused to allow the petitioners to withdraw their pleas. N.Y. CPL §220.60(3); *compare People* v. *McKennion*, 27 N.Y.2d 671, 313 N.Y.S.2d 876, 261 N.E.2d 910 (1970), *with People* v. *Dixon*, 29 N.Y.2d 55, 323 N.Y.S.2d 825, 272 N.E.2d 329 (1971). That is a matter of state law alone.

Petitioners also claim that they should have been permitted to withdraw their guilty pleas because they had been predicated upon a mutually mistaken interpretation of the relevant law. At the time of the entry of the petitioners' guilty pleas, on April 30, 1973, the assistant district attorney informed the trial court that cases were then pending before this Court and that, if these cases were decided in such a way that the prosecution of Mishkin and Wholesale became inconsisent with the principles of law enunciated by the Court, the prosecution would join in the petitioners' motions to withdraw their pleas of guilty and move to dismiss the indictment (A117-18, 124-25).[15] On October 3, 1973, more then five months later, Mishkin and Wholesale moved to withdraw their guilty pleas on the ground that Mishkin had "pleaded guilty [for himself and for the corporation] because he mistakenly believed he and Wholesale Book Corporation were charged wtih violating a constitutional statute and because the prosecutor overcharged [them] with 56 counts" (A107). The petitioners suggested that the mistake was revealed in the "United States Supreme Court decisions on June 21, 1973," and the subsequent decision of New York State Supreme Court Justice Gellinoff (A107-08).

In *Miller* v. *California*, 413 U.S. 15 (1973), and the cases decided with it on June 21, 1973, this Court modified the constitutional standards for the identification of obscene material subject to state regulation. However, in one of those cases, *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123 (1973), the Court expressly left to the state courts

15. The prosecutor was obviously referring to *Miller* v. *California*, 413 U.S. 15 (1973), and the cases decided with *Miller* (*see* note 7 *supra*), and to *Heller* v. *New York*, 413 U.S. 483 (1973).

the construction of state legislation in light of the modified standards. 413 U.S. at 130 n. 7.

In *Heller* v. *New York*, 413 U.S. 483 (1973), decided four days later, the Court declined to consider the constitutionality of the New York obscenity laws and remanded that question to the Court of Appeals for reconsideration in light of *Miller* and the cases decided with it. 413 U.S. at 494. On remand, the Court of Appeals held that the degree of protection afforded first amendment rights by the New York statutory standards exceeded the protection provided by the standards announced by this Court. Accordingly, the Court of Appeals held the New York standards constitutionally permissible. *People* v. *Heller*, 33 N.Y.2d 314, 352 N.Y.S.2d 601, 307 N.E.2d 805 (1973). Then, in *Redlich* v. *Capri Cinema*, 32 N.Y.2d 974, 353 N.Y.S.2d 738, 309 N.E.2d 136 (1974), the Court denied leave to appeal from the Appellate Division's reversal of Judge Gellinoff's conflicting decision. *Redlich* v. *Capri Cinema*, 43 A.D.2d 27, 349 N.Y.S.2d 697 (1st Dept. 1973).

In essence, then, the petitioners pleaded guilty with the understanding that they could withdraw their pleas of guilty if this Court declared the statute under which they had pleaded unconstitutional, or if a New York court did so. That did not happen.

Conclusion

The petition should be denied.

Respectfully submitted,

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BLEED THROUGH